

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-646.

BRADFORD SCHOOL BUS TRANSIT, INC., A CORPORATION,
AND THE ILLINOIS SCHOOL TRANSPORTATION AS-
SOCIATION, A NOT FOR PROFIT CORPORATION,

Petitioners,

vs.

THE CHICAGO TRANSIT AUTHORITY, A MUNICIPAL COR-
PORATION, THE URBAN MASS TRANSPORTATION AD-
MINISTRATION, AN AGENCY OF THE UNITED STATES OF
AMERICA, AND JUDITH T. CONNOR, ADMINISTRATOR OF
THE URBAN MASS TRANSPORTATION ADMINISTRATION,

Respondents.

**MEMORANDUM FOR RESPONDENT CHICAGO
TRANSIT AUTHORITY IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

The sole issue raised by the Petition for Certiorari in this cause is whether the Court of Appeals' decision conflicts with this Court's decision in *Nader v. Allegheny Airlines*, _____ U. S. _____, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976). Contrary to Petitioners' assertion, the doctrine of primary jurisdiction requires judicial deference to the Urban Mass Transportation Administration (UMTA) in this case, because Petitioners' Second Amended Complaint raises technical issues of fact not within the conventional knowledge of federal district courts.

The Court of Appeals held that Petitioners had standing to raise claims for relief under federal mass transit statutes which, under certain circumstances, prohibit school bus operations by federal grant recipients. Section 164(b), Federal Aid Highway Act of 1973, Title 49, U. S. Code § 1602a(b) (hereinafter "164(b)"); Section 3(g) of the Urban Mass Transportation Act of 1964, as amended, Title 49, U. S. Code § 1602(g) (hereinafter "3(g)"). Petitioners claim that the only questions before the district court would be the interpretation of the phrases "school bus operations," "competition" and "shall bar," as used in these statutes, and application of these phrases to alleged school bus operations by the Chicago Transit Authority ("CTA").

In quoting the statutes upon which they rely, Petitioners have omitted the conditions precedent to obligations of grant recipients under the statutes:

... "This subsection shall not apply unless private school-bus operators are able to provide *adequate* transportation, at *reasonable* rates, and *in conformance with applicable safety standards*; and this subsection shall not apply with respect to any State or local public body or agency thereof if it . . . was so *engaged in school bus operations any time* during the twelve-month period immediately prior to the date of the enactment of this subsection." [Emphasis added.]

The above-quoted language appears verbatim in both section 164(b) and section 3(g).¹ Petitioners state that they have omitted the conditions precedent because they were not pertinent to the decision below or to the question in this Court. (Petition, p. 3, fn. 6.) On the contrary, the language omitted by Petitioners provides ample support for the Court of Appeals' deference to the primary jurisdiction of UMTA.

In order to prove any violation of the school bus provisions by the CTA, Petitioners would be required to show that the

1. The full text of both sections is reprinted at the end of this Memorandum.

conditions precedent have been satisfied. Petitioners would be required to demonstrate:

1. that "adequate" transportation is available from private school bus operators;
2. that such transportation is available "at reasonable rates";
3. that such transportation is "in conformance with applicable safety standards"; and
4. that the CTA had not engaged in school bus operations within either of the "grandfather" provisions.

Each of these matters involves technical questions of fact, such as assessment of industry conditions and reasonableness of rates. Such matters are uniquely within the expertise and experience of an administrative agency—in this case, UMTA. *United States v. Western Pac. R. Co.*, 352 U. S. 59, 66-67 (1956). The determination of these questions also requires uniformity throughout the mass transit industry.

Petitioners' heavy reliance on *Nader v. Allegheny Airlines*, *supra*, is not warranted. In *Nader*, this Court emphasized that plaintiff's lawsuit did not involve technical questions of fact:

"The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry." [_____ U. S. at _____, 96 S. Ct. at 1987-88, 48 L. Ed. 2d at 656.]

The questions of safety, adequacy of service and reasonableness of rates presented by Petitioners' action here are unlike the questions regarding fraudulent misrepresentation in *Nader*. The questions here cannot be judged by standards within the conventional competence of the courts.

Petitioners' action here requires judicial deference to the expertise and experience of UMTA under the doctrine of primary jurisdiction. The Court of Appeals' decision was entirely

consistent with the decisions of this Court relating to primary jurisdiction, including *Nader v. Allegheny Airlines, supra*.

We respectfully contend that the Petition for Certiorari should be denied.

Respectfully submitted,

NORMAN J. BARRY,
 JOSEPH P. DELLA MARIA, JR.,
 RONALD F. BARTKOWICZ,
 Two First National Plaza,
 Chicago, Illinois 60603,
 (312) FRanklin 2-2345,
*Attorneys for Respondent, Chicago
 Transit Authority.*

Of Counsel:

ROTHSCHILD, BARRY & MYERS,
 Two First National Plaza,
 Chicago, Illinois 60603,
 (312) FRanklin 2-2345.

APPENDIX.

**Section 3(g) of the Urban Mass Transportation Act of 1964,
 as Amended, Title 49, U. S. Code § 1602(g):**

(g) No federal financial assistance shall be provided under this Act for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators. This subsection shall not apply to an applicant with respect to operation of a schoolbus program if the applicant operates a school system in the area to be served and operates a separate and exclusive schoolbus program for this school system. This subsection shall not apply unless private schoolbus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with facilities to be used therefor) was so engaged in schoolbus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under this Act.

**Section 164(b) of the Federal Aid Highway Act of 1973,
Title 49, U. S. Code § 1602a(b):**

(b) No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) the Urban Mass Transportation Act of 1964, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. This subsection shall not apply to an applicant with respect to operation of a school bus program if the applicant operates a school system in the area to be served and operates a separate and exclusive school bus program for this school system. This subsection shall not apply unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards, and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (2), and (3) of this subsection.